91st Congress, 2d Session } HOUSE OF REPRESENTATIVES { Report No. 91-1747

BANK HOLDING COMPANY ACT AMENDMENTS

December 15, 1970.—Ordered to be printed

Mr. Patman, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 6778]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6778) to amend the Bank Holding Company Act of 1956, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following: *That this Act may be cited as the "Bank Holding Company Act Amendments of 1970".*

TITLE I—BANK HOLDING COMPANIES

Sec. 101. (a) Section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)) is amended to read as follows:

"Sec. 2. (a)(1) Except as provided in paragraph (5) of this subsection, 'bank holding company' means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this Act.

"(2) Any company has control over a bank or over any company if—

"(A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;

"(B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or

"(C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

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"(3) For the purposes of any proceeding under paragraph (2)(C) of this subsection, there is a presumption that any company which directly or indirectly owns, controls, or has power to vote less than 5 per centum of any class of voting securities of a given bank or company does not have control over that bank or company.

"(4) In any administrative or judicial proceeding under this Act, other than a proceeding under paragraph (2)(C) of this subsection, a company may not be held to have had control over any given bank or company at any given time unless that company, at the time in question, directly or indirectly owned, controlled, or had power to vote 5 per centum or more of any class of voting securities of the bank or company, or had already been found to have control in a proceeding under paragraph (2)(C).

"(5) Notwithstanding any other provision of this subsection—

"(A) No bank and no company owning or controlling voting shares of a bank is a bank holding company by virtue of its ownership or control of shares in a fiduciary capacity, except as provided in paragraphs (2) and (3) of subsection (g) of this section. For the purpose of the preceding sentence, bank shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring bank or company has sole discretionary authority to exercise voting rights with respect thereto; except that this limitation is applicable in the case of a bank or company acquiring such shares prior to the date of enactment of the Bank Holding Company Act Amendments of 1970 only if the bank or company has the right consistent with its obligations under the instrument, agreement, or other arrangement establishing the fiduciary relationship to divest itself of such voting rights and fails to exercise that right to divest within a reasonable period not to exceed one year after the date of enactment of the Bank Holding Company Act Amendments of 1970.

"(B) No company is a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis.

"(C) No company formed for the sole purpose of participating in a proxy solicitation is a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation.

"(D) No company is a bank holding company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition.

"(E) No company is a bank holding company by virtue of its ownership or control of any State chartered bank or trust company which is wholly owned by thrift institutions and which restricts itselt to the acceptance of deposits from thrift institutions, deposits arising out of the corporate business of its owners, and deposits of public moneys.

"(F) No trust company or mutual savings bank which is an insured bank under the Federal Deposit Insurance Act is a bank holding company by virtue of its direct or indirect ownership or control of one bank located in the same State, if (i) such ownership or control existed on the date of enactment of the Bank Holding Company Act Amendments of 1970 and is specifically authorized by

applicable State law, and (ii) the trust company or mutual savings bank does not after that date acquire an interest in any company that, together with any other interest it holds in that company, will exceed 5 per centum of any class of the voting shares of that company, except that this limitation shall not be applicable to investments of the trust company or mutual savings bank, direct and indirect, which are otherwise in accordance with the limitations applicable to national banks under section 5136 of the Revised Statutes (12 U.S.C. 24).

"(6) For the purposes of this Act, any successor to a bank holding company shall be deemed to be a bank holding company from the date on which the predecessor company became a bank holding company."

(b) Section 2(b) of such Act is amended—

(1) by inserting "partnership" after "corporation";

(2) by striking out "(1)";

(3) by striking out ", or (2) any partnership"; and

(4) by adding after the period a new sentence as follows: " 'Company covered in 1970' means a company which becomes a bank holding company as a result of the enactment of the Bank Holding Company Act Amendments of 1970 and which would have been a bank holding company on June 30, 1968, if those amendments had been enacted on that date."

(c) The first sentence of section 2(c) of such Act is amended to read as follows: " 'Bank' means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States."

(d) Section 2(d) of such Act is amended—

(1) by striking out "or (2)" and inserting in lieu thereof "(2)"; and

(2) by striking out the period and inserting in lieu thereof the following: "; or (3) any company with respect to the management or policies of which such bank holding company has the power, directly or indirectly, to exercise a controlling influence, as determined by the Board, after notice and opportunity for hearing."

(e) Section 2 of such Act is further amended by adding at the end thereof a new subsection as follows:

"(i) The term 'thrift institution' means (1) a domestic building and loan or savings and loan association, (2) a cooperative bank without capital stock organized and operated for mutual purposes and without profit, or (3) a mutual savings bank not having capital stock represented by shares."

SEC. 102. Section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842) is amended—

(1) by adding at the end of subsection (a) a new sentence as follows: "For the purpose of the preceding sentence, bank shares acquired after the date of enactment of the Bank Holding Company Act Amendments of 1970 shall not be deemed to have been acquired in good faith in a fiduciary capacity if the acquiring bank or company

has sole discretionary authority to exercise voting rights with respect thereto, but in such instances acquisitions may be made without prior approval of the Board if the Board, upon application filed within ninety days after the shares are acquired, approves retention or, if retention is disapproved, the acquiring bank disposes of the shares or its sole discretionary voting rights within two years after issuance of the order of disapproval.";

(2) by adding at the end of subsection (b) a new sentence as follows: *"In the event of the failure of the Board to act on any application for approval under this section within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted."; and*

(3) by adding at the end thereof the following new subsection:

"(e) Every bank that is a holding company and every bank that is a subsidiary of such a company shall become and remain an insured bank as such term is defined in section 3(h) of the Federal Deposit Insurance Act."

SEC. 103. Section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843) is amended—

(1) by striking out paragraph (2) of subsection (a) and inserting in lieu thereof the following:

"(2) after two years from the date as of which it becomes a bank holding company, or in the case of a company which has been continuously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, or, in the case of any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment, after December 31, 1980, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than (A) those of banking or of managing or controlling banks and other subsidiaries authorized under this Act or of furnishing services to or performing services for its subsidiaries, and (B) those permitted under paragraph (8) of subsection (c) of this section subject to all the conditions specified in such paragraph or in any order or regulation issued by the Board under such paragraph: Provided, That a company covered in 1970 may also engage in those activities in which directly or through a subsidiary (i) it was lawfully engaged on June 30, 1968 (or on a date subsequent to June 30, 1968 in the case of activities carried on as the result of the acquisition by such company or subsidiary, pursuant to a binding written contract entered into on or before June 30, 1968, of another company engaged in such activities at the time of the acquisition), and (ii) it has been continuously engaged since June 30, 1968 (or such subsequent date). The Board by order, after opportunity for hearing, may terminate the authority conferred by the preceding proviso on any company to engage directly or through a subsidiary in any activity otherwise permitted by that proviso if it determines, having due regard to the purposes of this Act, that such action is necessary to prevent undue concentration of resources, decreased or unfair competition, conflicts of interest, or

unsound banking practices; and in the case of any such company controlling a bank having bank assets in excess of $60,000,000 on or after the date of enactment of the Bank Holding Company Act Amendments of 1970 the Board shall determine, within two years after such date (or, if later, within two years after the date on which the bank assets first exceed $60,000,000), whether the authority conferred by the preceding proviso with respect to such company should be terminated as provided in this sentence. Nothing in this paragraph shall be construed to authorize any bank holding company referred to in the preceding proviso, or any subsidiary thereof to engage in activities authorized by that proviso through the acquisition, pursuant to a contract entered into after June 30, 1968, of any interest in or the assets of a going concern engaged in such activities. Any company which is authorized to engage in any activity pursuant to the preceding proviso or subsection (d) of this section but, as a result of action of the Board, is required to terminate such activity may (notwithstanding any otherwise applicable time limit prescribed in this paragraph) retain the ownership or control of shares in any company carrying on such activity or a period of ten years from the date on which its authority was so terminated by the Board.";

(2) by striking out "period" in the last sentence of subsection (a) and inserting in lieu thereof "two-year period";

(3) by striking out that part of the text of subsection (c) which precedes the first numbered paragraph and inserting in lieu thereof the following: "The prohibitions in this section shall not apply to any bank holding company which is (i) a labor, agricultural, or horticultural organization and which is exempt from taxation under section 501 of the Internal Revenue Code of 1954, or (ii) a company covered in 1970 more than 85 per centum of the voting stock of which was collectively owned on June 30, 1968, and continuously thereafter, directly or indirectly, by or for members of the same family, or their spouses, who are lineal descendants of common ancestors; and such prohibitions shall not, with respect to any other bank holding company, apply to—";

(4) by striking out paragraph (8) of subsection (c) and inserting in lieu thereof the following:

"(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern;";

(5) by striking out paragraph (9) of subsection (c) and inserting in lieu thereof the following:

"(9) shares held or activities conducted by any company organized under the laws of a foreign country the greater part of whose business is conducted outside the United States, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of this Act and would be in the public interest;";

(6) by striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon, and by adding after paragraph (10) the following:

"(11) shares owned directly or indirectly by a company covered in 1970 in a company which does not engage in any activities other than those in which the bank holding company, or its subsidiaries, may engage by virtue of this section, but nothing in this paragraph authorizes any bank holding company, or subsidiary thereof, to acquire any interest in or the assets of any going concern (except pursuant to a binding written contract entered into before June 30, 1968, or pursuant to another provision of this Act) other than one which was a subsidiary on June 30, 1968;

"(12) shares retained or acquired, or activities engaged in, by any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment, or by any subsidiary thereof, if such company—

"(A) within the applicable time limits prescribed in subsection (a)(2) of this section (i) ceases to be a bank holding company, or (ii) ceases to retain direct or indirect ownership or control of those shares and to engage in those activities not authorized under this section; and

"(B) complies with such other conditions as the Board may by regulation or order prescribe; or

"(13) shares of, or activities conducted by, any company which does no business in the United States except as an incident to its international or foreign business, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of this Act and would be in the public interest.

In the event of the failure of the Board to act on any application for an order under paragraph (8) of this subsection within the ninety-one-day period which begins on the date of submission to the Board of the complete record on that application, the application shall be deemed to have been granted. The Board shall include in its annual report to the Congress a description and a statement of the reasons for approval of each activity approved by it by order or regulation under such paragraph during the period covered by the report."; and

(7) by redesignating subsection (d) as subsection (e), and by adding after subsection (c) a new subsection as follows:

"(d) To the extent that such action would not be substantially at variance with the purposes of this Act and subject to such conditions as it considers necessary to protect the public interest, the Board by order, after opportunity for hearing, may grant exemptions from the provisions of this section to any bank holding company which controlled one bank prior to July 1, 1968, and has not thereafter acquired the control of any

other bank in order (1) to avoid disrupting business relationships that have existed over a long period of years without adversely affecting the banks or communities involved, or (2) to avoid forced sales of small locally owned banks to purchasers not similarly representative of community interests, or (3) to allow retention of banks that are so small in relation to the holding company's total interests and so small in relation to the banking market to be served as to minimize the likelihood that the bank's powers to grant or deny credit may be influenced by a desire to further the holding company's other interests."

SEC. 104. (a) Section 11(b) of the Bank Holding Company Act of 1956 (12 U.S.C. 1849(b)) is amended—

(1) by striking out "this Act" the first two times it appears and inserting in lieu thereof "section 3";

(2) by inserting "approved under section 3" in the second sentence immediately before "shall be commenced"; and

(3) by inserting "approved under section 3" in the last sentence immediately before "in compliance with this Act".

(b) Section 11(c) of such Act (12 U.S.C. 1849(c)) is amended by striking out "pursuant to" and inserting in lieu thereof "under section 3 of".

SEC. 105. With respect to any proceeding before the Federal Reserve Board wherein an applicant seeks authority to acquire a subsidiary which is a bank under section 3 of the Bank Holding Company Act of 1956, to engage directly or indirectly in a nonbanking activity pursuant to section 4 of such Act, or to engage in an activity otherwise prohibited under section 106 of this Act, a party who would become a competitor of the applicant or subsidiary thereof by virtue of the applicant's or its subsidiary's acquisition, entry into the business involved, or activity, shall have the right to be a party in interest in the proceeding and, in the event of an adverse order of the Board, shall have the right as an aggrieved party to obtain judicial review thereof as provided in section 9 of such Act of 1956 or as otherwise provided by law.

SEC. 106. (a) As used in this section, the terms "bank", "bank holding company", "subsidiary", and "Board" have the meaning ascribed to such terms in section 2 of the Bank Holding Company Act of 1956. For purposes of this section only, the term "company", as used in section 2 of the Bank Holding Company Act of 1956, means any person, estate, trust, partnership, corporation, association, or similar organization, but does not include any corporation the majority of the shares of which are owned by the United States or by any State. The term "trust service" means any service customarily performed by a bank trust department.

(b) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

(1) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(2) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(3) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(4) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(5) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this section.

(c) The district courts of the United States have jurisdiction to prevent and restrain violations of subsection (b) of this section and it is the duty of the United States attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. The proceedings may be by way of a petition setting forth the case and praying that the violation be enjoined or otherwise prohibited. When the parties complained of have been duly notified of the petition, the court shall proceed, as soon as possible, to the hearing and determination of the case. While the petition is pending, and before final decree, the court may at any time make such temporary restraining order or prohibition as it deems just. Whenever it appears to the court that the ends of justice require that other parties be brought before it, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and subpenas to that end may be served in any district by the marshal thereof.

(d) In any action brought by or on behalf of the United States under subsection (b), subpenas for witnesses may run into any district, but no writ of subpena may issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the prior permission of the trial court upon proper application and cause shown.

(e) Any person who is injured in his business or property by reason of anything forbidden in subsection (b) may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

(f) Any person may sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by reason of a violation of subsection (b), under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity and under the rules governing such proceedings. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

(g)(1) Subject to paragraph (2), any action to enforce any cause of action under this section shall be forever barred unless commenced within four years after the cause of action accrued.

(2) Whenever any enforcement action is instituted by or on behalf of the United States with respect to any matter which is or could be the subject of a

private right of action under this section, the running of the statute of limitations in respect of every private right of action arising under this section and based in whole or in part on such matter shall be suspended during the pendency of the enforcement action so instituted and for one year thereafter: Provided, That whenever the running of the statute of limitations in respect of a cause of action arising under this section is suspended under this paragraph, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within the four-year period referred to in paragraph (1).

(h) Nothing contained in this section shall be construed as affecting in any manner the right of the United States or any other party to bring an action under any other law of the United States or of any State, including any right which may exist in addition to specific statutory authority, challenging the legality of any act or practice which may be proscribed by this section. No regulation or order issued by the Board under this section shall in any manner constitute a defense to such action.

TITLE II—PROVISIONS RELATING TO COINAGE

SEC. 201. Section 101 of the Coinage Act of 1965 (31 U.S.C. 391) is amended to read as follows:

"SEC. 101. (a) The Secretary may mint and issue coins of the denominations set forth in subsection (c) in such quantities as he determines to be necessary to meet national needs.

"(b) Any coin minted under authority of subsection (a) shall be a clad coin. The cladding shall be an alloy of 75 per centum copper and 25 per centum nickel, and shall weigh not less than 30 per centum of the weight of the whole coin. The core shall be copper.

"(c)(1) The dollar shall be 1.500 inches in diameter and weigh 22.68 grams.

"(2) The half dollar shall be 1.205 inches in diameter and weigh 11.34 grams.

"(3) The quarter dollar shall be 0.955 inch in diameter and weigh 5.67 grams.

"(4) The dime shall be 0.705 inch in diameter and weigh 2.268 grams.

"(d) Notwithstanding the foregoing, the Secretary is authorized to mint and issue not more than one hundred and fifty million one-dollar pieces which shall have—

"(1) a diameter of 1.500 inches;

"(2) a cladding of an alloy of eight hundred parts of silver and two hundred parts of copper; and

"(3) a core of an alloy of silver and copper such that the whole coin weighs 24.592 grams and contains 9.837 grams of silver and 14.755 grams of copper."

SEC. 202. For the purposes of this title, the Administrator of General Services shall transfer to the Secretary of the Treasury twenty-five million five hundred thousand fine troy ounces of silver now held in the national stockpile established pursuant to the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98–98h) which is excess to strategic needs. Such transfer shall be made at the value of $1.292929292 for each fine troy ounce of silver so transferred. Such silver shall be used exclusively to coin one-dollar pieces authorized in section 101(d) of the Coinage Act of 1965, as amended by this Act.

Sec. 203. The dollars initially minted under authority of section 101 of the Coinage Act of 1965 shall bear the likeness of the late President of the United States, Dwight David Eisenhower, and on the other side thereof a design which is emblematic of the symbolic eagle of Apollo 11 landing on the moon.

Sec. 204. Half dollars, as authorized under section 101(a)(1) of the Coinage Act of 1965, as in effect prior to the enactment of this Act may, in the discretion of the Secretary of the Treasury, continue to be minted until January 1, 1971.

Sec. 205. (a) The Secretary of the Treasury is authorized to transfer, as an accountable advance and at their face value, the approximately three million silver dollars now held in the Treasury to the Administrator of General Services. The Administrator is authorized to offer these coins to the public in the manner recommended by the Joint Commission on the Coinage at its meeting on May 12, 1969. The Administrator shall repay the accountable advance in the amount of that face value out of the proceeds of and at the time of the public sale of the silver dollars. Any proceeds received as a result of the public sale in excess of the face value of these coins shall be covered into the Treasury as miscellaneous receipts.

(b) There are authorized to be appropriated, to remain available until expended, such amounts as may be necessary to carry out the purposes of this section.

Sec. 206. The last sentence of section 3517 of the Revised Statutes, as amended (31 U.S.C. 324), is amended by striking the following: ", except that coins produced under authority of sections 101(a)(1), 101(a)(2), and 101(a)(3) of the Coinage Act of 1965 shall not be dated earlier than 1965".

Sec. 207. Section 4 of the Act of June 24, 1967 (Public Law 90–29; 31 U.S.C. 405a–1 note), is amended by adding at the end thereof the following new sentence: "Out of the proceeds of and at the time of any sale of silver transferred pursuant to this Act, the Treasury Department shall be paid $1.292929292 for each fine troy ounce."

Sec. 208. Section 3513 of the Revised Statutes (31 U.S.C. 316) and the first section of the Act of February 28, 1878 (20 Stat. 25; 31 U.S.C. 316, 458) are repealed.

Sec. 209. Coins produced under the authority of section 101(d) of the Coinage Act of 1965, as amended by this Act, shall bear such date as the Secretary of the Treasury determines.

And the Senate agree to the same.

WRIGHT PATMAN,
WILLIAM A. BARRETT,
LEONOR K. SULLIVAN,
HENRY S. REUSS,
WILLIAM B. WIDNALL,
ALBERT W. JOHNSON,
J. WILLIAM STANTON,
Managers on the Part of the House.

JOHN SPARKMAN,
WILLIAM PROXMIRE,
HARRISON A. WILLIAMS,
WALLACE F. BENNETT,
JOHN G. TOWER,
Managers on the Part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6778) to amend the Bank Holding Company Act of 1956, and for other purposes, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The Senate struck out all of the House bill after the enacting clause and inserted a substitute amendment. The committee of conference has agreed to a substitute for both the House bill and the Senate amendment. Except for minor and nonsubstantive provisions, and technical, clarifying, and conforming changes, the following statement explains the differences between the House bill and the substitute agreed to in conference.

GENERAL STATEMENT

Early in this Congress, on February 17, 1969, a bill, H.R. 6778, was introduced which was designed to bring under the coverage of the Bank Holding Company Act of 1956 all one bank holding companies.

In the late 1960's, a large number of banks began converting themselves into one bank holding companies in order to avoid regulation by the Federal Reserve Board under the Bank Holding Company Act. In addition, many significant nonbank corporations, including major conglomerates, began acquiring one bank, thus mixing banking and nonbanking in complete contravention of the purpose of both Federal banking laws going back to the 1930's and the Bank Holding Company Act of 1956.

This wave of one bank holding company creations alarmed many people on Capitol Hill, in the Administration, at the Federal Reserve Board and significant professional observers of the American economic system. Indeed, President Nixon stated on March 24, 1969, that:

> The Secretary of the Treasury, with my approval, has today transmitted to the Congress proposed legislation on the further regulation of bank holding companies.
>
> Legislation in this area is important because there has been a disturbing trend in the past year toward erosion of the traditional separation of powers between the suppliers of money—the banks—and the users of money—commerce and industry.
>
> Left unchecked, the trend toward the combining of banking and business could lead to the formation of a relatively small number of power centers dominating the American economy. This must not be permitted to happen; it would be bad for banking, bad for business, and bad for borrowers and consumers.

The strength of our economic system is rooted in diversity and free competition; the strength of our banking system depends largely on its independence. Banking must not dominate commerce or be dominated by it.

To protect competition and the separation of economic powers, I strongly endorse the extension of Federal regulation to one bank holding companies and urge the Congress to take prompt and appropriate action.

H.R. 6778, as originally introduced, in addition to plugging the so-called one bank loophole, accomplished a number of other important objectives for tightening the present Bank Holding Company Act:

(1) It removed the partnership exemption;

(2) It provided that the Federal Reserve Board could find actual control of a bank by a company even though that company controlled less than 25 percent of the stock of the bank;

(3) It retained the 1956 definition of what constituted a permissible bank-related activity for bank holding companies to engage in;

(4) It contained no grandfather clause exemption;

(5) It contained an anti-tie-in provision applying to all insured banks, whether or not it is part of a holding company system; and

(6) It removed the exemption in the 1956 Act for bank stock held in trust by a bank.

It is interesting to note that after almost two years of detailed, thorough and protracted consideration of this legislation by both the House of Representatives and the Senate, the version of the bill that is now being presented by the conferees to the House for consideration is substantially similar to the bill originally introduced in February of 1969.

The amended H.R. 6778 being presented here as agreed to by the House and Senate conferees eliminates the partnership exemption; authorizes the Federal Reserve Board to find actual control of a bank where a company holds less than 25 percent of its stock; essentially retains the 1956 standard for determining what bank-related activities a bank holding company may engage in; subjects to potential Federal Reserve Board jurisdiction under the Bank Holding Company Act one bank holding companies, no matter when created; contains an anti-tie-in provision covering all banks, bank holding companies and subsidiaries of bank holding companies; gives to nonbank competitors of bank holding companies standing to challenge before the Board and in the courts applications filed under the Bank Holding Company Act; and removes the exemption in the future for substantial blocks of bank stock held by bank trust departments with sole power to vote that stock.

Because of the complexities of this legislation and the rather complicated legislative history of the bill over the last two years, it seems appropriate to set forth in particular detail the explanation of the bill agreed to by the conference.

The major points to be discussed are (1) the bank-related activities language, also known as the language of Section 4(c)(8) of the Bank Holding Company Act; (2) exemptions that are or may be granted from the Act; (3) the anti-tie-in provisions; (4) the provisions relating to standing for competitors and others; and (5) the coinage provisions.

Bank Related Activities—Section 4(c)(8)

The House passed H.R. 6778 containing a rewritten section 4(c)(8) test which permitted a bank holding company to engage in any nonbanking activity that is "functionally related to banking" and also could be reasonably expected to produce certain enumerated public benefits that would outweigh enumerated adverse effects. In addition, in order to more carefully define the above-stated test, the House bill contained a list of six specific activities which were either prohibited to bank holding companies or which they could engage in only to a limited extent.

The Senate bill, on the other hand, contained the "functionally related" and public benefits test in a similar form to the House bill, but, significantly, failed to include any list of specific activities prohibited to bank holding companies or in which their participation is limited.

Since section 4(c)(8) is the exclusive authorization for bank holding companies to conduct nonbank businesses except in the few instances where a specific activity is authorized elsewhere in this statute (e.g. Section 4(c)(1)(B), which authorizes a safe deposit business) or in other relevant statutes, this was a crucial issue in resolving all of the differences over this important piece of legislation.

Because of this very important difference in the two versions of H.R. 6778, it became very difficult for the conference to resolve this issue. The problem was resolved by inserting substitute language for the pertinent provisions of both versions of H.R. 6778.

Aside from the question of applying the Bank Holding Company Act of 1956 to one bank holding companies—the basic issue presented to the Congress by the dramatic growth of one bank holding companies in the last few years—the most important and controversial issue was over the question of whether to retain or substantially change the 1956 definition as to what the Federal Reserve Board could permit regulated bank holding companies to engage in outside their strictly banking activities. The 1956 Act provided in Section 4(c)(8) the following language (describing nonbanking holdings not prohibited by the Act):

> (8) shares of any company all the activities of which are or are to be of a financial, fiduciary, or insurance nature and which the Board after due notice and hearing, and on the basis of the record made at such hearing, by order has determined to be so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto and as to make it unnecessary for the prohibitions of this section to apply in order to carry out the purposes of this Act.

The language agreed to by the conferees for amending Section 4(c)(8) reads as follows:

> (8) shares of any company the activities of which the Board after due notice and opportunity for hearing, has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining

> whether a particular activity is a proper incident to banking or managing or controlling banks, the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices. In orders and regulations under this subsection the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern.

As can be seen by comparing the language of the present Act with the language agreed to by the conferees seven specific changes were made. Discussing these changes in the order in which they appear in Section 4(c)(8), the first change was to remove the word "all". No great significance should be attached to the removal of this word. Whether the word "all" is in the sentence or not seems of little importance, since the Board must find that the activities of the company must meet the tests stated elsewhere in Section 4(c)(8) in order for the Board to approve them as a proper activity to be carried on by a subsidiary of a bank holding company.

The next change made in Section 4(c)(8) was to delete the phrase "of a financial, fiduciary, or insurance nature". Tracing the history of this phrase through the legislative process prior to the conference action, it is not revealed very clearly what the various contending forces had in mind by deleting the phrase (as in the House Committee reported version and the Senate version) or modifying it (as in the version that passed the House and the Administration version introduced by Congressman Widnall and Senators Sparkman and Bennett on March 24, 1969). It would be virtually impossible to fairly attribute any clear or precise intention to Congress in finally deleting the "financial, fiduciary or insurance" language.

It should be pointed out, however, that the report of the Senate Banking and Currency Committee on H.R. 6778 seems to concur with the view of the House conferees in agreeing to delete the "financial, fiduciary and insurance" language as being redundant and having little substantive effect independent of the specific tests to be applied in determining whether a particular nonbank activity should be permitted under the tests set forth in section 4(c)(8). The Senate report states in regard to the deletion of the "financial, fiduciary or insurance" language from the Senate version:

> The deletion of these shall not be construed as indicating the Committee's intent that these activities be no longer permitted. To the contrary, *these* activities are "functionally related to banking" and *are included* under the new provision adopted by the Committee *to the full extent they were permitted under the existing act*, and to such additional extent as the Board may find it desirable under the new criteria established. [Emphasis supplied.]

Of course, as discussed below, the new criteria of "functionally related to banking", referred to by the Senate report, was rejected by the conferees. Therefore, the activities permitted under the section

4(c)(8) language as adopted by the conference are the same whether the words "financial, fiduciary, or insurance" appear in the text or not.

Another strong indication that no substantive significance should be attached to the deletion of the "financial, fiduciary, or insurance" language is found in a statement in the Prevailing Views signed by a majority of the House Banking and Currency Committee and appearing in the House Committee report on H.R. 6778. In these Prevailing Views supporting the position of changing the "closely related" language of Section 4(c)(8) to the "functionally related" test first suggested by Chairman William McChesney Martin of the Federal Reserve Board, Chairman Martin is quoted in support of this change. Following this quotation, the Prevailing Views state:

> A majority of the Committee agreed [with Chairman Martin's position] and rewrote Section 4(c)(8) of the 1956 Act accordingly, *utilizing the key words of Chairman Martin. The rewritten proposal in pertinent part provides that* with Federal Reserve Board approval *a bank holding company may retain or acquire shares in any company performing any activity that* the Board has determined '*is functionally related to banking* in such a way that its performance by an affiliate of a bank holding company can reasonably be expected to produce benefits to the public that outweigh possible adverse effects' [Emphasis supplied.]

Although H.R. 6778 as reported from the House Banking and Currency Committee with the support of those signing the Prevailing Views deleted the term "financial, fiduciary or insurance", the Prevailing Views gave no significance to that deletion, those views stressing that the key words were "functionally related". This certainly is consistent with the feeling of those who supported the substantial amendments to the Committee-reported bill which were adopted on the Floor of the House.

In light of the above discussion, any attempt to attach great significance to the deletion of the "financial, fiduciary or insurance" language would not be consistent with the legislative history which clearly indicates that Congress intended no great significance to be given to this deletion from present law.

The third change in Section 4(c)(8), replacing the language "due notice and hearing" with "due notice and *opportunity* for hearing", was made at the recommendation of the Federal Reserve Board so that the Board would not be required to hold hearings in all cases involving Section 4(c)(8) applications, but should hold hearings in all cases where a contest is raised.

The inclusion of the term "(by order or regulation)" was made to indicate that the Board could act under Section 4(c)(8) either by order in specific cases or by regulation in a general classification or category of cases in order to provide maximum flexibility as a procedural matter in administering this section.

Another change made in the existing Section 4(c)(8) is the deletion of the phrase "the business of". This deletion was made after consideration of the Federal Reserve Board's suggestion that it be deleted, because prior interpretations of the Board indicated that the retention of this term could lead to continued interpretation encouraging tie-in arrangements which Congress clearly intends to prohibit under these amendments to the Bank Holding Company Act. Under previous rulings of the Board, the term "the business of" had been interpreted as meaning that there had to be some specific business relationship between a customer of a bank subsidiary of a holding company before the Board would allow a business relationship between the customer and a nonbank subsidiary of the same holding company. The reasoning to which the conferees directed their attention in eliminating the term "the business of" was well stated in a letter from Chairman Arthur Burns of the Federal Reserve Board, dated November 23, 1970, directed to the attention of the Conference during its deliberations. The letter states in pertinent part:

> If the conferees prefer to keep "closely related" in the language of the statute, our objective would be served by changing the words "the business of banking or of managing or controlling banks" to read "banking or managing or controlling banks". We have in mind indicating that a nonbank subsidiary's activities should be related to banking (or managing or controlling banks) generally, rather than to the specific business carried on by the subsidiary banks of the particular holding company involved.

The above reason stated by Chairman Burns for deleting the term "the business of banking" states very well the clear intention of the Conference in deleting that term.

Another change made in Section 4(c)(8) from the language of present law is to remove the last clause of that provision, " and as to make it unnecessary for the prohibitions of this section to apply in order to carry out the purposes of this Act." This, it is clear without any question, was removed because it adds absolutely nothing to the meaning of the provision and has almost never been considered by the Board in its interpretations to have any significance in interpreting Section 4(c)(8). Therefore, it is redundant and was eliminated.

A significant change in Section 4(c)(8) agreed to by the Conference is the addition of two completely new sentences to the current section. These sentences read:

> In determining whether a particular activity is a proper incident to banking or managing or controlling banks, the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices. In orders and regulations under this subsection the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern.

The factors to be considered by the Board under the so-called public benefits test quoted above in authorizing bank holding company ownership or control of companies already found by the Board in a proceeding to be closely related activities to banking under Section 4(c)(8) (as well as in determining whether it is necessary to terminate the authority to engage in certain activities conferred on bank holding companies by the proviso in new Section 4(a)(2)), include the dangers of undue concentration of resources, decreased or unfair competition, conflicts of interest and unsound banking practices.

The danger of undue concentration of economic resources and power is one of the factors which led to the enactment of this legislation, and constitutes a significant threat to the continued healthy evolution of our free economy. American trade has always operated on the principle that relationships between businessmen, large and small, should be founded on economic merit rather than monopoly power. Our national policies of limited governmental regulation and interference in trade and commerce, however, do make it possible for undue concentrations of resources and economic power to override fundamental fairness and economic merit when responding to the profit motive. This possibility is enhanced when concentrations of power are centered about money, credit and other financial areas, the common denominators of the economy. The dangers may be more pronounced where resources are more easily capable of being marshalled, or where the course of business is likely to lead to the constant realization of the existence of power by buyers and sellers in the marketplace. The dangers of undue concentration of resources include, but are not limited to, specific competitive effects, which are themselves relevant factors under the Act. It should be clear that this legislation directs the Board to consider all reasonable ramifications of the concentration of resources in fulfilling its responsibilities under Section 4.

The Board is also directed to examine the possibility of decreased or unfair competition when considering the merits of bank holding company activities. Where a bank holding company seeks to engage in related activities through acquisition, in whole or in part, of a going concern, the elimination of existing competition will be an important negative factor, for other subsidiaries of the bank holding company, or the company itself, may already be providing the products and services in the market served by the company to be acquired. In such circumstances, where the possible benefits to the public of bank hoidlng company activity are already being provided, the elimination of an independent competitive alternative will weigh heavily in the balance against approval. In view of the great variety of products and services which are presently being provided by banking subsidiaries of bank holding companies, the Board will have to carefully scrutinize a number of markets and submarkets for competitive effects.

Equally important will be adverse competitive effects which may result from a bank holding company's acquisition of a going concern with which it may not presently compete. One of the asserted justifications for permitting bank holding companies to engage in activities that the Board has determined independently to be closely related to banking, is to permit the introduction of new innovative and competitive vigor into those markets which could benefit therefrom. Where a bank holding company enters a market through acquisition of a major going concern, it may not have the incentive to compete vigorously, thereby bringing the possible benefits into play, as it would immediately succeed to what it might consider its fair share of the market. On the other hand, where a bank holding company enters a new market *de novo*, or through acquisition of a small firm, as opposed to acquisition of a substantial competitor, its desire to succeed in its new endeavor is more likely to be competitive. This legislation specifically emphasizes the importance of the manner in which a bank holding company may enter new activities. Such considerations will be particularly important in the context of expansion by bank holding companies into new geographic markets.

Other competitive effects that the Board must consider in connection with Section 4(c)(8) applications will include the potential dangers of tie-ins and reciprocity. Tie-ins occur where a customer is forced or induced to accept other products and services along with that product which he seeks. Such tie-ins may result from actual coercion by a seller or from a customer's realization that he stands a better chance of securing a scarce and important commodity (such as credit) by "volunteering" to accept other products or services rather than seeking them in the competitive market place. In either case, competition is adversely affected, as customers no longer purchase a product or service on its own economic merit.

Reciprocity, which involves the induced provision of products and services by the customer rather than his acceptance of other products and services, may also come about in these involuntary or "voluntary" manners.

Section 106 of the bill, which has come to be known as the anti-tie-in section, will largely prevent coercive tie-ins and reciprocity. But the dangers of "voluntary" tie-ins and reciprocity are basically structural and must be dealt with by the Board in determining the competitive effects of bank holding company expansion into fields closely related to banking when considering applications under Section 4(c)(8). These will be difficult questions, for assurances of good faith and the intention not to engage in tie-ins and reciprocity by the applicant bank holding companies will largely be irrelevant to the just as serious dangers of "voluntary" tie-ins and reciprocity. The Board must, in any case, consider these problems in carrying out its responsibilities under the Act.

The Board must also consider adverse competitive effects which may result from bank holding company activities in a given industry where its subsidiary banks hold substantial voting control over other competitors in their trust departments. Similarly, shareholder, director and officer interlocks between bank holding companies and other competitors in a field which a bank holding company seeks to enter should be analyzed for any possible adverse competitive effects. These possible effects, and those discussed above should not be considered an exhaustive list. It is probable that other types of competitive effects will arise, and this legislation gives the Board ample authority, and indeed the responsibility, to take them into consideration.

In interpreting the public benefits test, special mention should be made of the inclusion of the "unfair competition" factor in the bill as agreed to by the Conference. This factor was included in the House passed bill, but was not in the Senate version. The conferees agreed to include the "unfair competition" factor in the final version.

Unfair competition is a broad legal concept having its origin in the common law. It is also found in a significant number of state and Federal statutes. It is an important factor for the Board to consider in its broadest context, especially in light of the testimony concerning the potential for unfair competition to be carried on by bank holding companies against small independent businesses. Some, but by no means all, of the kinds of problems that the Board should consider in giving weight to this factor are the potential for (a) intimidation of customers to cause them to refrain from buying a competitor's products; (b) commercial espionage with the purpose of procuring confidential information that could be used unfairly in competing with a nonbank competitor (this is peculiarly applicable to banking institutions since they deal to a very great extent with confidential information obtained from customers); (c) inducing breach of contract; (d) enticing away competitor's employees in order to cripple his business; (e) price discrimination; (f) selling a service below cost or offering a service for no cost in order to obtain a business for another subsidiary; (g) harassing practices such as intimidating customers and/or competitors.

In addition to the competitive factors discussed in detail above, the Board must also consider the potential for conflicts of interest or unsound banking practices that are likely to arise from permitting a bank holding company to engage in a particular bank-related activity given the circumstances of its existing operations. The Board should look carefully at these factors, as well as the competitive factors.

In connection with the overall application of the public benefits test, it is important to emphasize that the bank holding company making application under Section 4(c)(8) must bear the burden of proof in showing that its carrying on of a particular nonbank activity would produce benefits to the public that outweigh any adverse effects. This was made very clear in the Senate report which stated:

> He [the Assistant Attorney General, Antitrust Division] concluded that such a provision would "* * * permit banks to demonstrate now or in the future that their entry into these activities in a given manner would be in the public interest." Later he stated that the approval of a particular application would be "* * * dependent upon an affirmative finding of public benefit by the regulatory authority, which suggests that bank holding companies seeking to engage in given activities bear the burden of demonstrating positive benefits therefrom."

The above discussion describes in some detail each individual change made in Section 4(c)(8) as compared with existing law. What has not been discussed is how in an overall sense this key provision is to be interpreted by the Federal Reserve Board.

The basic content and the essential test found in the 1956 Act, that is that an activity must be "so closely related to banking or managing or controlling banks as to be a proper incident thereto", is retained in the new Section 4(c)(8). It is clear from the legislative history of this bill that at every stage, including in the House Committee, on the House Floor, in the Senate Committee and on the Senate Floor, attempts were made to significantly broaden Section 4(c)(8) by the adoption of a new test. One such attempt was the so-called Administration proposal which was to rewrite section 4(c)(8) to read in pertinent part, "to be financial or related to finance in nature or of a fiduciary or insurance nature. . . ." Another proposed standard being advocated by the Federal Reserve Board, beginning with Chairman

Martin's testimony before the House Committee, and continually supported before the Senate Committee and to Members of the Conference by Chairman Burns of the Federal Reserve Board, as well as by various spokesmen for the Administration and the banking industry, was the so-called "functionally related" test. The "closely related" test was characterized by these and other witnesses as being too narrow, too rigid and too confining. They strongly and repeatedly urged that a new, broader test be adopted.

It is clear that all who advocated adoption of the "functionally related" test regarded it as a more liberalized and expansive granting of discretion by the Congress to the Federal Reserve Board, designed to indicate an approval of the desire by advocates of the change to allow bank holding companies to engage in certain activities which have not been considered traditional banking activities and which heretofore have not been permitted by the Federal Reserve Board under the existing law. The following are a few illustrations of such references out of many that could be cited:

In a letter to Chairman Sparkman of the Senate Banking and Currency Committee on June 2, 1970, Comptroller of the Currency William B. Camp states:

> This is in reference to Senator Proxmire's request during our testimony on May 15, 1970, for specific instances of desirable bank holding company activities now restricted by the 1956 Act which could properly be permitted under the expanded statutory standard, such as the one contained in S. 1664.
>
> Dr. Burns, in his testimony on May 14, 1970, listed those activities which the Board feels might be appropriate as holding company subsidiaries and intimated that some broadening of the *present standard* was necessary before the Board could fully implement this list. . . . The Board apparently feels, and we agree, that a broadening of the present definition is *necessary* in order to permit approval of a significant number of the activities listed above as desirable. [Emphasis added.]

In testimony presented on behalf of the Association of Registered Bank Holding Companies (Senate Hearings at pages 956 and 957), Mr. J. Harvie Wilkinson, Jr., stated:

> Under the present language of §4(c)(8) of the Act, which would be continued by S. 1052, the Board has the discretion to determine what activities of a financial, fiduciary, or insurance nature are "so closely related to banking" . . . "as to be a proper incident thereto" and therefore permissible for bank holding companies. Former Federal Reserve Board Chairman Martin testified before the House Banking Committee that the phrase "so closely related to banking" was "unnecessarily constricting" and suggested that the "functionally related" language contained in H.R. 6778 be substituted. We are delighted that Federal Reserve Chairman Burns endorses this approach and that it is acceptable to the Justice Department. We agree that the present language of §4(c)(8) is very restrictive and *does not give the Board sufficient*

discretion to keep pace with the development of new banking services. Our amendment [the functionally related language] is set forth in Exhibit 3. [Emphasis added.]

In the final analysis, the broader "functionally related" test was rejected and, with the changes discussed in detail above, essentially the "closely related" test of the 1956 Act was agreed to by the conferees.

How would one define the test that has been agreed to by the Conferees for the guidance of the Federal Reserve Board and the courts? Chairman Martin of the Federal Reserve Board, in testifying before the House Banking and Currency Committee on this bill, stated:

> On the basis of the language of the statute and its legislative history, the Board has interpreted the Section 4(c)(8) exemption to mean that there must be a direct and significant connection between the proposed activities of the company to be acquired and the business of banking, or of managing and controlling banks, as conducted by the bank holding company or its banking subsidiaries.

With the elimination of the term "the business of", as discussed above, the first sentence of the new Section 4(c)(8) should be interpreted to mean that there must be a direct and significant connection between the activities of the company proposed to be acquired and banking as generally carried on or between the activities of the company proposed to be acquired and managing or controlling banks as generally carried on. Under the new language of section 4(c)(8) there no longer need be a relationship between the particular activities of the company proposed to be acquired and the business of the particular bank holding company seeking approval of an acquisition under section 4(c)(8). In other words, under the new section 4(c)(8) there must be a direct and significant connection between the proposed activities and the kinds of activities that banks generally now carry on i.e. closely related to banking in general.

The agreement reached by the Conferees with respect to the provisions of section 4(c)(8) of the Act perhaps gets closest to the basic issue of how the Conferees decided to continue delineating between banking and commerce. The decision of the Conferees to reject the "functionally related test" advocated by those witnesses who argued for a more liberal and expansive approach by the Federal Reserve Board in authorizing nonbank activities for bank holding companies is intended to be construed to mean that the Congress was not convinced that such expansion and liberalization was justified. Consequently, the Congress intends that those activities which the Board and other witnesses claim would have been permitted under the "functionally related test", are not authorized by our decision to retain the "so closely related" test, which is considerably less expansive and liberal than the rejected "functionally related test". The significance of the Conferees' decision regarding the language finally adopted for section 4(c)(8) is enhanced by the fact that the Congress, for the first time since the enactment of the Bank Services Corporation Act, has examined and reaffirmed its determination to keep bank holding companies in banking and in only those areas which are so closely related to banking as to be proper incident thereto.

Another important question is the relationship between the "closely related" test and the public benefits test found in the second sentence of the newly written Section 4(c)(8). The effect of section 4(c)(8) as a whole is to establish, in effect, two tests for the Federal Reserve Board to use in deciding cases under section 4(c)(8). First, the Board must determine whether the particular activity sought to be engaged in is "so closely related to banking or managing or controlling banks as to be a proper incident thereto." And, secondly, in determining whether a particular activity is "a proper incident" to banking or managing or controlling banks, the Board must determine whether the public benefits outweigh the adverse effects, such as the ones enumerated in the second sentence of section 4(c)(8). Even if the activity is found by the Board to be closely related to banking, it must also determine whether it meets the public benefits test. In that sense, the Board may find in a particular case that it cannot approve a proposed activity for a specific bank holding company because it fails to meet the second test even though it may determine that it is closely related to banking.

In this sense, then, the new section 4(c)(8) may be considered to be a more difficult standard than that found in the present law. This is so because under the previous language of section 4(c)(8) there was no public benefits tests. Therefore, there may be circumstances where the Board would turn down an application under the second test—the public benefits test—that it would have had to approve under the old test because the only significant element in that standard was the "closely related" one. Now both tests must be met.

Exemptions

From the beginning of the consideration of this bill, great attention and concern has been directed at the problem of existing exemptions to the Bank Holding Company Act, as well as exemptions proposed by various groups in order to meet special problems that they claimed existed. Of course, to the greatest extent possible, laws should apply generally to all within a class intended to be covered, with as few specific exemptions as possible permitted.

The specific exemptions agreed to by the conferees can be briefly summarized as follows: (1) retention of the exemption from Section 4 of the Act for labor unions and agricultural and horticultural organizations (in the Senate version); (2) exemption from Section 4 of the Act for any company controlling a bank 85 percent or more of whose voting shares was collectively owned on June 30, 1968, and continuously thereafter by members of the same family (in the Senate version); (3) exemption for any federally-insured trust company or any mutual savings bank which owns one bank if owned on the date of enactment of the bill and such ownership is authorized by state law (in the Senate version); (4) exemption from coverage of the Act for any company which is chartered as a bank but which does not make commercial loans (in the Senate version); (5) exemption from the Act, subject to Federal Reserve Board approval and conditions, for any company controlling a bank operated for the purpose of facilitating transactions in foreign commerce if the Board determines that such control is not at substantial variance with the purposes of the Act and would be in the public interest (agreed to as in Senate version but similar provision in House version); (6) exemption from regulation under section 4 of the Act for (a) any company the greater part of whose business is conducted outside of the United States and (b) any company doing no business in the United States, in both situations as long as such business is an incident to foreign business, if the Federal Reserve Board finds that the exemption would not be substantially at variance with purposes of the Act and is in the public interest (in substance in both versions of H.R. 6778); (7) exemption from coverage of the Act for any bank controlled through a company wholly owned by thrift institutions, if the bank restricts itself to the acceptance of deposits from thrift institutions, deposits in connection with the corporate business of its owners and deposits of public monies (in the House version). The bill also continues two exemptions found in the 1956 Act relating to the underwriting of bank stock and proxy solicitations.

It will be seen that many of the exemptions outlined above are neither permanent not automatic, since the Board has the authority to withdraw, modify or condition the exemptions in order to conform them to the purposes of the Bank Holding Company Act and be consistent with the public interest. Others apply to a very small number of special cases that, it is felt, require special treatment. The Board should interpret these exemptions as narrowly as possible in order that all bank holding companies which should be covered under the Act in order to protect the public interest will, in fact, be covered.

In addition to these specific exemptions, two categories of one bank holding companies not covered under existing law may continue to operate in the future without being covered by the Act under certain circumstances set forth in the Act as being amended. One such amendment, which becomes Section 4(d) of the new Act, was adopted to cover situations existing with respect to one bank holding companies that have controlled over a long period of years one small bank, usually in a small town where some particular hardship may be created if the holding company were forced of divest itself of its bank.

No similar provision was contained in the House version of H.R. 6778. On the other hand, the Senate version contained a provision (not in the House bill) that would have exempted from section 4 of the Bank Holding Company Act any one bank holding company in existence when the bill is enacted if (1) the net worth of the subsidiary bank does not exceed $3 million or (2) the net worth of the subsidiary bank is not greater than $50 million and is less than 25 percent of the net worth of the entire company. This provision is not included in the conference substitute. Instead, the substitute would authorize the Federal Reserve Board to grant exemptions for one bank holding companies formed before July 1, 1968, if such action would not substantially be at variance with the purposes of the Act, and it is determined that the exemption is justified in any one of three kinds of situations.

First, exemptions are authorized to avoid disrupting business relationships that have existed over a long period of years without adversely affecting the banks or the communities they serve.

The conferees were reminded that some one bank holding companies came into existence even before the Bank Holding Company Act of 1956 was enacted, and little or no evidence exists that any harm has resulted from these long-standing affiliations. In one example the affiliation of a large manufacturing company with a small local bank resulted from a successful effort in the 1920's to save the bank from failure. Another instance was a bank acquired in the 1930's by a private school located in the same town, which also controls large non-banking business activities. A grandfather clause that freezes the grandfathered company into the lines of business it was in on the grandfather date would have forced such companies to divest themselves of their bank, since it is clearly more important to these companies to have the right to expand into new non-banking lines than it is to keep their bank. In most instances where a large nonbank enterprise owns a bank, particularly where it acquired the bank in recent years, the bank can be sold without hardship. Thus, this exemption is not intended to apply to that type of situation. The conferees recognize that the equities are far stronger in favor of special consideration where the relationship has existed over a long period of years.

Reinforcing this equity argument in some cases is the possibility that if the company were forced to sell the bank, it could not find a local buyer. Other things being equal, it is clearly preferable to maintain local ownership of small community banks. Accordingly, the conference substitute would authorize exemptions where necessary to avoid the forced sale of a small, locally-owned bank to purchasers who are not representative of community interests. However, the Board should examine carefully the question of whether there is a good faith effort made to dispose of the bank to purchasers representative of community interests so that the question of a forced sale is a real problem.

Finally, it seems unlikely that a bank that is quite small in relation to the overall size of the parent holding company could be used in any meaningful way to advance the interests of other affiliated companies. There would seem to be no real threat, therefore, that retention of the bank would contribute to undue concentration of economic power in the holding company system. Where the bank is also relatively small in terms of the banking market it serves—so that there is no possibility of its achieving a dominant position that would lead to the kinds of involuntary tie-ins that Assistant Attorney General McLaren has warned against in his testimony on this legislation—exemption from the divestiture requirement may also be justified. This is the third situation in which the conference substitute would authorize exemptions.

Exemption under this third clause requires among other things that a retained bank be "so small in relation to the banking market to be served as to minimize the likelihood that the bank's power to grant or deny credit be influenced by a desire to further the holding company's other interests."

Committees of Congress have in recent years been seriously concerned about the basic dangers of monopoly power often enjoyed by banks in local markets. Such power rests on a number of considerations, including regulatory policy, scarcity of alternatives, and the difficulties that borrowers tend to have in shopping around for credit or finding alternative banking services.

If a bank which is owned by a holding company has a substantial position in a local market, and thus has power in that market, it may be tempted to try to use that power to further the interests of other holding company subsidiaries, either through reciprocal arrangements or by conditioning the availability of credit or services on the use of some other products or services offered by other subsidiaries of the holding company.

In addition, even without affirmative action or coercion by the bank or holding company, the mere existence of market power may influence potential customers of the bank to choose to deal with other holding company affiliates in order to increase their chances of obtaining credit on favorable terms from the bank.

The question of whether a bank is "small in relation to its market" must depend primarily on the structure of the local banking market involved, for these considerations reflect its market power. A bank which is small in absolute terms may nevertheless be substantial in a small or isolated market where other alternatives are not conveniently available. This is a point that the Supreme Court stressed in its recent *Phillipsburg* decision and should be applied by the Board in enforcing this provision.

The most appropriate way to deal with the issue of the size of a bank in relation to its market is to use the type of market share analysis developed by economists and already applied by the Board and the courts in bank acquisition cases. In most cases, a bank with more than 10 percent of the bank deposits in its local market cannot be regarded as being "small in relation to its market". Of course, even a bank with less than 10% of a very large metropolitan market may be a large bank in absolute terms, and, in these circumstances, its retention by a large non-bank-related enterprise would be likely to be "substantially at variance with the purposes of this Act", and would thus not be entitled to an exemption under this provision.

The Board faces a difficult problem in administering this provision. If, for example, it authorizes an exemption for a company which acquired its bank forty years ago, the Board may find it difficult to resist applications for exemptions in the case of more recent acquisitions. We recognize that the Board may have to draw an arbitrary line—for example, limiting the first stated exemption to relationships in existence for fifteen years or more—in order to keep this exemption from becoming such a large loophole that it would be substantially at variance with the purposes of the Bank Holding Company Act. Such lines must be drawn if the prohibitions in the Act against combining bank and nonbank businesses in a holding company system are to be effective; the exemptive authority must not become the basis for wholesale exemptions that would undermine the Act and place those companies that must comply with it at an unfair competitive disadvantage.

The Board is authorized to make these exemptions "subject to such conditions as it considers necessary to protect the public interest." For example, the Board should make sure that an exemption granted to a company that owns a small bank will terminate if the bank later exceeds the applicable size limit. And an exemption based on inability to find a local buyer should terminate whenever such a buyer appears who is prepared to purchase the bank on reasonable terms.

Grandfather Clause

The conference also agreed that, in lieu of a grandfather clause provision which would have completely exempted certain bank holding companies from coverage under the Bank Holding Company Act either because they became a one bank holding company prior to a certain date (in the case of the Senate bill, prior to July 1, 1968), or a combination of a date and the size of the bank holding company and its subsidiary bank (in the case of the House bill, prior to May 9, 1956, with banking assets of less than $30 million and nonbank assets of less than $10 million), it would substitute a somewhat different kind of provision.

This provision brings under the potential coverage of the Act all bank holding companies regardless of size or date of creation.

Section 4(a) would permit a company brought within the provisions of the Act in 1970, as amended, to engage in those activities which were permitted on June 30, 1968 (or on a date subsequent to June 30, 1968, in the case of activities carried on as a result of the acquisition by such company or subsidiary, pursuant to a binding written contract entered into on or before June, 1968, of any company engaged in such activities at the time of the acquisition), provided the activities have been continuously engaged in since June 30, 1968, or such subsequent date. However, the right to engage in these activities, which are in addition to activities otherwise permitted under the Act, is not absolute.

The conference committee was greatly concerned that certain activities permitted by this exemptive provision could result in detriment to the public interest, and thereby defeat the purposes of the Act. It was further recognized that this potential detriment was more likely to occur in the case of a bank holding company owning a bank with substantial assets than in the case of banks with relatively small assets. Indeed, the principal justification for providing a grandfather clause was to protect the traditional small town bank holding company which some felt provided a special service to the community. Accordingly, the amended provision permits flexibility in determining which activities the Board will allow to be continued and which must be terminated.

With respect to bank holding companies which control bank assets in excess of $60 million, the Board is required under the Act to reach a determination, within two years of the enactment of these amendments, as to whether the benefits of the grandfather clause are to be accorded to each such company. A decision by the Board to withdraw these benefits is required by the Act unless it can be established that there would not be undue concentration of resources, decreased or unfair competition, conflicts of interest or unsound banking practices, if the company were to retain control of one or more of the affiliates in question. With respect to all one bank holding companies, the Board, at any time, may terminate the exemption using the same test.

This test is similar to the second test required to be used by the Board in applications under the new section 4(c)(8) of the Act, the so-called public benefits test. An analysis similar to that outlined in the discussion above concerning the meaning of this public benefits test should be made by the Board in determining whether to continue exemptions from the Act under the provisions of this section.

The fact that the statute requires the Board to act within two years concerning the exemptions involving one bank holding companies controlling banks with over $60 million in assets in no way implies that the Board should feel restrained from pursuing determinations on exemptions for holding companies each of whose banks have assets of less than $60 million.

Thus, the Board is required to conduct continuing surveillance over the privilege accorded to certain bank holding companies to conduct activities which are otherwise prohibited by the Act. This gives the Board flexibility, while providing safeguards against abuses which the Act is designed to prevent. It is recognized that these exemptive privileges could defeat the purposes of this Act, and therefore it was determined to permit them only when it was clearly in the public interest to do so.

Therefore, the Board should within a reasonable amount of time examine all one bank holding companies created prior to July 1, 1968, to determine whether, under the stated test, any of them are entitled to exemptions from the Act. Congress merely wishes the Board to take expeditious action in the immediate future on the larger and, therefore, potentially more dangerous one bank holding companies created before June 30, 1968, before examining the propriety of continuing the exemption for the under $60 million category.

Also, the Board should give no presumption of entitlement to exemption to a one bank holding company in the future, even though the Board has initially made a determination to allow the exemption to stand.

Determinations made by the Board under this provision require the consideration of public interest criteria with respect to a given bank holding company and an adjudication of facts relative to the operation, service area, competition, etc., in question, and the characteristics of that bank holding company and the nature of the activity concerned. The Board should also consider the size of the bank in relation to the assets of the holding company, as well as the size of the bank in relation to the other banks in the market area, and the scope of the activities of the nonbank affiliate in the market area of the bank.

Proceedings with respect to bank holding companies with bank assets in excess of $60 million should be initiated promptly by the Board and a determination must be made within two years. Proceedings permitted with respect to companies with bank assets of less than $60 million may be initiated by the Board either on its own motion or on the motion of any party in interest upon good cause shown. Since the issues in both types of proceeding would be basically factual, and the Board's order may have a significant impact on the business of a given bank holding company or on the competitors of the bank holding company affected by the order, fundamental fairness requires that such procedings be conducted through the established adjudicatory process, including adequate notice, opportunity for hearing, and a determination made by order of the Board.

The Board must decide whether to terminate or not to terminate the authority in accordance with the record before it and fully substantiate its finding by relying on the record. The Board may order the termination of such an activity in whole or in part or with respect only to certain activities and not with respect to others. Further, with respect to any activities that the Board may sanction to be continued, the Board shall by its order impose such terms and conditions on the continuation of that activity so as to provide safeguards against future dangers which may arise from the conduct of that activity. Further, the Board under this provision has continuing authority to review its prior decisions and, after further proceeding hereunder when appropriate, terminate activities, even though it had previously sanctioned their continuation. Nothing in this provision would prohibit the Board, after careful consideration and experience in dealing with specific cases under this provision, from establishing general guidelines for determining whether to terminate exemptions.

One further point related to the matter of exemptions should be made. The House receded to the Senate concerning the question of how such exemptions from the Act permitted by the Board or otherwise permitted by the Act would be terminated under certain circumstances. Any one bank holding company in existence before June 30, 1968 whose exemption has not been terminated by the Board under Section 4(a) would not be permitted to retain its exemption under any circumstance if it attempted to carry on a new activity subsequent to June 30, 1968 not permitted under the Act. Likewise, it would not be permitted to retain its exemption if it acquired a going concern engaged in an activity not permitted under the Act but was being carried on by the holding company prior to June 30, 1968. In addition, certain Senate provisions were agreed to by the conference permitting a reasonable amount of flexibility in changing corporate structure and permitting new acquisitions by one bank holding companies being covered by the Act for the first time if they elect to divest themselves of their banks (thus giving up their status as bank holding companies) within the 10-year divestiture period provided for in this legislation. This flexibility, however, is subject to conditions which the Board may prescribe. The Board, under these provisions, should not permit any acquisitions or other structural changes in one bank holding companies electing to divest themselves of their bank within 10 years which are contrary to the purposes of the Act.

Anti-Tie-In Provisions

H.R. 6778, as originally introduced, contained an anti-tie-in provision. However, this provision was not included in the bill when it was referred to the Senate. The Senate version did contain an anti-tie-in provision which was agreed to in the conference. The Senate anti-tie-in provision provides the following.

It prohibits a bank from providing any credit, property, or service for a customer on the condition that he obtain from the bank some additional credit, property, or service, or that he provide to the bank some additional credit, property, or service. Exempted from this prohibition are transactions exclusively involving two or more of four specified traditional banking services—loans, discounts, deposits, or trust services.

It prohibits any subsidiary bank from providing any credit, property or service for a customer on the condition that he must obtain from, or provide to, the holding company or any other subsidiary thereof some additional credit, property or service.

It prohibits any requirement that the bank's customer must not obtain some other credit, property or service from a competitor of the bank, its parent, or a sister subsidiary, other than a reasonable requirement to assure soundness of credit.

It authorizes the Board to provide exceptions to the prohibition, the Department of Justice to enforce the prohibitions and private parties to sue if injured by a violation of the prohibition. For purposes of this anti-tie-in provision the term "company" includes "person".

The House conferees agreed to this provision, particularly because of the necessity for protecting small independent businessmen from unfair and predatory business practices by banks, bank holding companies and subsidiaries thereof. This provision covers all insured banking institutions, as well as bank holding companies.

The Senate conferees assured the House conferees during the conference on one very important point that the House conferees felt was not clear either from the language of the Senate anti-tie-in provision or from the legislative history of this provision in the Senate.

The Senate anti-tie-in provision was amended on the Floor of the Senate to exclude from its coverage certain specific so-called traditional banking services, i.e. loans, discounts, deposits and trust services. The Senate conferees stated in response to questions put by the House conferees that this exemption only applied where all of the components, of a particular transaction fell into the category of loans, discounts, deposits and trust services. If any of these traditional banking services were tied to another service offered by a bank, a bank holding company, or another subsidiary of a bank holding company, the exemption would not apply.

In addition, the Senate conferees assured the House conferees that, even within the four exempted traditional bank services, nothing in the Senate anti-tie-in provision exempted them from coverage under the provisions of existing antitrust law dealing with tie-ins.

Standing for Competitors and Others

Another major provision of H.R. 6778, which was in the Senate version but not in the House version, was the provision giving standing to competitors of bank holding companies to enter proceedings as parties in interest before the Board and in the courts. This provision allows a present or potential competitor the right to join as a party in interest before the Board and to appeal any decision of the Board if it renders a decision adverse to him in any proceeding before the Board where an applicant seeks authority to acquire a banking subsidiary under Section 3, to engage in a nonbanking activity pursuant to Section 4 or to engage in a business practice otherwise prohibited under the anti-tie-in provision.

While it is understood that the Board has in recent years taken a properly liberal attitude concerning the right of competitors of banks and bank holding companies to have standing before the Board in its proceedings, this provision is intended to state that position in the law. It is not in any way to be interpreted, however, to restrict the participation of interested parties in proceedings before the Board only to those types of proceedings enumerated in the standing provisions of this legislation.

If it would be appropriate to allow the entrance of interested parties in other proceedings held in connection with subjects covered by this legislation, or if standing is given under other provisions of Federal law, including but not limited to the Administrative Procedure Act, the provisions of this legislation are in no way intended to narrow the right to standing. In other words, the broadest possible forum should be allowed for adversary proceedings to take place in order that all issues may be aired completely.

More specifically, this provision does not limit the standing of any party in any proceeding before the Board who, under the holdings in recent Supreme Court decisions (*ADAPSO* v. *Comptroller of the Currency* and *Arnold Tours* v. *South Shore National Bank*) would be deemed to be affected by the result in that proceeding, and which party's interests are relevant to the purposes of the Act.

Title II—Provisions Relating to Coinage

The House receded to the Senate and accepted an amendment related to U.S. coinage.

All but one of the provisions of this amendment have been passed by the House in the form of H.R. 14127 on October 15, 1969.

This legislation, incorporated as Title II of the conference bill, provides that (1) there would be a phasing out by January 1, 1971, of the use of silver in half dollars and the authorization of a cupro-nickel 50-cent coin of the same composition as the quarter and the dime; (2) a new cupro-nickel-clad coin of $1 denomination is authorized to be minted for general circulation, bearing the likeness of the late President of the United States, Dwight David Eisenhower, and, on the other side, a design emblematic of the symbolic Eagle of Apollo 11 landing on the moon; and (3) machinery is established for the orderly and equitable sale to the public, at market value, of approximately three million silver dollars remaining in Treasury vaults, mostly rare and numismatically valuable coins from the old Carson City Mint. These approximately three million valuable silver dollars will be offered to the public in a manner recommended by the Joint Commission on the Coinage at its meeting of March 12, 1969. At that time the Joint Commission on the Coinage agreed to an auction procedure for the sale of these rare silver dollars by the General Services Administration. Under this procedure, the GSA would establish a minimum price for each class of rare coin. An individual could bid for a coin at that minimum price or at a price in excess of the minimum price established by GSA.

In addition, Title II, Section 203, of the conference bill provides for the minting of 150 million of the new $1 pieces to be 40 percent silver content. To help accomplish this purpose, 25½ million fine troy ounces of silver would be transferred to the Treasury from the defense stockpile to be used exclusively for the special silver coins.

It is understood by the conferees that 130 million of the new silver coins will be manufactured and sold as uncirculated commemoratives and 20 million of them as proof coins, under administrative arrangements through the Treasury Department assuring their widest possible distribution among citizens interested in acquiring a few each.

WRIGHT PATMAN,
WILLIAM A. BARRETT,
LEONOR K. SULLIVAN,
HENRY REUSS,
Managers on the Part of the House.

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